



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO. 668 OF 1986**

**MARETE.....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

Man's inhumanity to man.

Makes Countless Thousands Mourn,

Said the Poet Robbie Burnes and the founding father of this Nation in the hopes of lessening the number of mourners enacted section 74 of the Constitution, which reads (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84. Both section 74 and section 84 are similar to the provisions of other Commonwealth Constitutions. It might be thought that the newly independent states who in their constitution enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those wield power.

Both Mr Kiraitu for the applicant and Miss Macharia for the state have cited to me Commonwealth cases where similar provisions in other Commonwealth cases have been convassed. With the aid of these cases I find the contravention of any of the protective provisions of the constitution by the state is prohibited and that the High Court of Kenya is empowered to award redress to any person who has suffered because of the contravention by the state of these provisions. Redress further bears its ordinary meaning of reparation or compensation for the wrong sustained. Compensation can include loss of earnings consequent on the contravention of the constitutional protection and recompence for the inconvenience and distress suffered. The Courts can give aggravated but not exemplary damages nor punitive damages.

To get to the facts of this case, the applicant was a Technical Assistant in the Ministry of Agriculture and Livestock Development. He was a married man with 4 children. He had worked with the Ministry for 13 years, and had been admitted to the Permanent and Pensionable establishment on the 9th May, 1979. His monthly salary was shs 1,950 and as he was stationed in North Eastern Province he received a

hardship allowance of 600/- per month together with a house allowance. In summary he was a middle grade civil servant working in a remote area and how he could ever been thought to be a danger to the state I find it hard to understand.

On the 1st August, 1982 the Kenya Air Force revolted and for some hours was in control of the state. A Police Constable Solomon Maluki heard on the VOK about the coup. He visited a house where some people were listening to the radio and discussing the revolt. I imagine as the applicant said in a letter to his Permanent Secretary of 17.1.83 the house was in panic, as is the normal state of people who live in a peaceful and stable society when this stability is threatened by rebellion or invasion. As the corporal said in answer to Munene "Nobody was happy." Nevertheless 5 middle grade civil servants were prosecuted for conduct likely to lead to a breach of the peace but fortunately this prosecution was discontinued as its chances of success seem very remote indeed on the 3rd September, 1982. The incident should have been allowed to rest in peace. Nevertheless some treason witchhunters resurrected the trivial incident and on the 17<sup>th</sup> day of November, 1982 the Office of the President (inspired by a letter from the Provincial Commissioner of the 4th November, 1982 which I have not seen) asked the permanent Secretary of the Ministry of Livestock Development to dismiss two clerical officers (one was the applicant) for disloyal behavior.

I must say I can detect no disloyal behaviour in the account given of the incident by the corporal and get the impression that some Government officers were endeavouring to impress by being astute in smelling out treason.

Miss Macharia was tempted at one time to contend that this letter of the 17th November, was an exercise of the President's power under section 25 of the Constitution but wisely did not press this point.

One would have thought that Livestock's Permanent Secretary on receiving this letter would have reached for his copy of the Public Service Commission Regulations to see if he could, and if he could how he could comply with the Office of the President's suggestion. He obviously didn't, hence the ensuing mess.

On the 15th December, 1982 the District Livestock Development Officer, North Eastern Province purported to dismiss the applicant. This officer had no power whatsoever to dismiss the applicant. The applicant promptly objected to this dismissal and the Ministry obviously unsure of its position tried another ploy: on the 25th January 1983, Miss C M Kamau, writing for the Permanent Secretary informed the applicant that he was suspended, that he would receive no salary during the period of his suspension and that he could not leave his duty station without permission. The applicant was transferred to Meru where he was required to report daily. This suspension was plainly illegal as an officer can only be suspended when proceedings have been commenced for his dismissal Reg. 24 (2) of the Public Service Commission Regulations, and such proceedings were not commenced until the Permanent Secretary's letter to the applicant of the 2nd August, 1985. I need not recite subsequent developments prior to the institution of these proceedings.

The applicant was kept first at Wajir and then at Meru from January 1983 until August, 1985 without pay and work. He was not permitted to leave his station and obtain other work for a period more than 2 1/2 years. He was not given an opportunity to seek work to support his family. Had these proceedings invoked section 73 of the Constitution forbidding the holding of a person in servitude I would have no hesitation in holding that the applicant had been in servitude for this period of 2 1/2 years. This application however invokes section 74 so what I have to decide is whether the applicant has been subject to torture or to inhuman or degrading treatment. I have no doubt to subject a person to 2 1/2 years without pay, without work and without freedom to seek work is mental torture and inhuman and

degrading treatment. Such treatment becomes even more reprehensive when inflicted upon a married man with 4 children. I am re-inforced in these views by Mr Kiraitu's citation of definitions of torture, inhuman and degrading from *Blacks Legal Dictionary* and Miss Macharia's citation of the Botswana case of the *State vs Petrus* 1985 LR C 699 and in particular the definition of inhuman referred to on page 714 of the Report from *Shorter Oxford Dictionary*.

Before dealing with what redress I should award to the applicant, I should perhaps refer to the manner in which the Ministry dealt with the applicant's claim. The applicant's advocates served a Notice on the Attorney General in June 1986. The Ministry was promptly informed of the claim but it had failed even to respond to the Attorney General's request for the instructions when proceedings were commenced in December, 1986. When the case came before Mr Justice Bosire, Miss Macharia for the State had no instructions nor had she instructions when the case came before Justice O'Connor in February or March. The Ministry only condescended to give the Attorney General instructions when this court made it clear that it considered the permanent secretary had a personal obligation to answer the applicant's claim. This is an appalling performance. This country believes in the Rule of law but the Ministry of Livestock development shares little of this belief.

I now come to the question of what remedies I should grant to the applicant. Mr Kiraitu has made it clear that he is not attacking the dismissal of the applicant by the Public Service Commission. He could not do so in these proceedings as the Commission is not a party to these proceedings. I should therefore give him declaration as follows:

- (1) That the suspension of the applicant from January, 1983 to August 1985 was unlawful.
- (2) That the applicant was subjected to torture and inhuman and degrading treatment by the Ministry of Livestock Development during the aforesaid period of unlawful suspension.

As to damages the applicant's monthly emoluments were 1,950/-. I hold that he is entitled to be paid a sum of 64,000 as loss of wages taking into account the loss of allowances and the incidences of income tax and other deductions. It was further inhuman to dismiss the applicant without a cent after the long period of servitude without pay, so I feel I should add to this sum of Kshs 64,000/- a portion of the capitalized value of the applicant's pension entitled as at the 2nd August, 1985. With the aid of agreed figures supplied by Mr Kiraitu and Miss Macharia I determine this as Kshs 115,000.

The applicant is further entitled to general damages for the pain and suffering inflicted upon him. Considering the facts of this case and the principles enumerated in the cases cited by both counsel I award a sum Kshs 100,000 as general damages.

The sum of Kshs 179,000 will bear interest at court rates from the 2<sup>nd</sup> August, 1985, the sum of Kshs 100,000 will bear interest from today. The applicant is entitled to his costs. Finally a word of commendation for Mr Kiraitu for his clear and unimpassioned presentation of the case and to Miss Macharia for her co-operation with the court startlingly different from the Ministry she represented.

Dated and Delivered at Nairobi this 29<sup>th</sup> day of April 1987

**J.F SHIELDS**

.....

## JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)